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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1049

OMAN CONSTRUCTION CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION OF OMAN CONSTRUCTION CO., INC., FOR THE WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

No. .....

OMAN CONSTRUCTION CO., INC.,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION OF OMAN CONSTRUCTION CO., INC., FOR THE WRIT OF CERTIORARI

THE OPINION BELOW

The Opinion sought to be reviewed in this Court is that of the United States Circuit Court of Appeals for the Sixth Circuit and since the Opinion was not reported, it will be found in the Appendix beginning at page A1. The Opinion of the Court was rendered in Civil Action No. 15,104 in a *supplementary* proceeding filed by the National Labor Relations Board as Petitioner, seeking to enforce a supplementary Order of the Labor Board, and the United States Circuit Court of Appeals rendered its Opinion in the *supplementary* proceeding on November 16, 1964.

JURISDICTION OF THIS COURT ON CERTIORARI

(a) The decree of the Court sought to be reviewed, and the time of its entry was November 16, 1964. The time for the filing of a Petition for the Writ of Certiorari in this cause was extended by an Order of this Court, on an Appellate Petition, to and including April 15, 1965. A copy of such Order so extending Petitioner's time will be found in the Appendix at page A4.

(b) The Statutory provisions believed to confer on this Court jurisdiction to review the judgment or decree in question, by the Writ of Certiorari, is 28 U.S.C. §1254, and is as follows:

> "1254. Courts of appeals; certiorari, appeal; certified questions
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

* *

Petitioner realizes that the Writ of Certiorari is not a matter of right, and that the issuance of such a Writ rests in the sound discretion of this Court, but Petitioner avers that there are specific and important reasons for the issuance of the Writ in this case, they being:

The Court of Appeals has in this case rendered a decision which this Petitioner believes to be in conflict with other decisions of the Federal Appellate Courts and has decided an important question of Federal Law which has not been, but should be settled by this Court, and has decided a Federal question in a way in conflict with other ap-

plicable Federal decisions, and has so far departed from the acceptable course of judicial proceedings as to call for an exercise of this Court's power of supervision and final determination.

QUESTIONS PRESENTED FOR REVIEW

The important federal question presented for review in the terms of this particular case without unnecessary detail is whether or not the United States Circuit Court of Appeals has *supplementary* jurisdiction to enforce a supplementary Order of the National Labor Relations Board under applicable Federal Statutes where such Court has previously passed upon the enforcibility of a previous plenary final proceeding, and has entered a final Order thereon *without any remand* by the Court to the National Labor Relations Board for Supplementary Proceedings, and without any retention of jurisdiction in the Court with respect to said matters. It is Petitioner's view and insistence that the United States Circuit Court of Appeals is completely without jurisdiction, under the Federal Statutes, to hear and determine and undertake to enforce *supplementary proceedings* of the Labor Board without a prior remand for such further supplementary proceedings after the United States Circuit Court of Appeals has held a previous plenary hearing and rendered a final decree with respect to a prior decision of the National Labor Relations Board *relating to the same matters.*

THE FEDERAL STATUTES INVOLVED

Since the Federal Statutes are quite lengthy, they are merely cited herein as 29 U.S.C., §160(e) and (f) (U.S.C. §29), but said Statutes are set out in full in the Appendix at pages A4-A6.

BRIEF AND ARGUMENT

Conceding that the United States Court of Appeals has jurisdiction to review a final Order of the National Labor Relations Board, Appellant contends that said Court has no jurisdiction under the Statute to review a so-called *subsequent supplemental order* of the National Labor Relations Board, *without having previously remanded the cause to the National Labor Relations Board for further and additional or supplemental proceedings.*

In *Harper* v. *T. Housing Authority*, 197 Tenn., at page 265, Tomlinson, J., speaking for the Supreme Court of Tennessee, said:

> "However, we cannot, for the sake of expediency, take a jurisdiction not conferred on us."

The question of public importance in this case is whether an intermediate federal court ought to *take* jurisdiction as a matter of *expediency* where, in fact, the statute fails to grant such jurisdiction to the Court.

It is the duty of the Supreme Court (we believe), on this petition, to ascertain from the record, *as a matter of law*, whether the Circuit Court of Appeals for the Sixth Circuit could properly take jurisdiction on the *second* petition of the N.L.R.B. under the jurisdiction vested in said Court by the Act of Congress *without a previous remand to the Board for supplemental proceedings.*

Southern Hotel v. *Jones*, 177 U.S. 449;
Stratton v. *Ry. Co.*, 282 U.S. 10;
Aztec Mining Co. v. *Ripley*, 151 U.S. 79;
Spans v. *People*, 360 U.S. 315.

The Supreme Court of the United States is the *only* federal constitutional Court in the United States.

Article III, Sec. 1-2, Constitution of United States.

The jurisdiction of all other federal Courts, including that of the United States Court of Appeals for the Sixth Circuit, is fixed by Act of Congress.

Hodgson v. *Bowerbank*, 9 U. S. 303;
Venner v. *Great Northern Ry. Co.*, 209 U.S. 24;
Kline v. *Burke Const. Co.*, 260 U.S. 226.

The determination of this appeal, therefore, depends on the Constitution and the proper construction of the federal statutes, and the case may be said to arise under the Constitution and laws of the United States, and this petition therefore is proper, and should be granted.

Tennessee v. *Davis*, 100 U.S. 257;
Patton v. *Brady*, 184 U.S. 608;
U. S. v. *Coe*, 155 U.S. 76.

In terms of this particular case the record facts (which will disclose the question of law involved) appear in the per curiam opinion of the United States Court of Appeals for the Sixth Circuit, filed November 16, 1964, as follows:

"No. 15104

"UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

"National Labor Relations Board, Petitioner, vs. Oman Construction Co., Inc., Respondent.	On Motion of National Labor Relations Board for Entry of Supplemental Decree Specifying the Amount of Back Pay due under Court's Decree of April 22nd.

Denied November 16, 1964

"Before: Cecil and O'Sullivan, Circuit Judges, and Boyd, District Judge.

"Per Curiam. This cause is before the Court on motion of the petitioner, National Labor Relations Board, for entry of a supplemental decree specifying the amount of back pay due one William Nelson, under order of this Court of April 22, 1963, enforcing the order of petitioner against the respondent, Oman Construction Co., Inc.

"The response to the motion of the Board was a motion to dismiss the action for the reasons: 1. that this Court has no jurisdiction to issue a supplemental decree, and, 2. that if the Court has jurisdiction to issue a supplemental decree, the order of the Board should not be enforced because it is not supported by substantial evidence.

"By opinion of this Court, under date of April 22, 1963, reported at 316 F.2d 230, enforcement of the order of the National Labor Relations Board was granted. The opinion 'directed that the involved employee be

offered re-employment and made whole for lost wages, as a consequence of his layoff and respondent's refusal to reemploy him.' The involved employee was Nelson. A mandate was issued to the Board on the opinion and order of this Court on May 14, 1963. Subsequently, a hearing was had before an examiner. The finding of the examiner that Nelson was entitled to an award of back wages in the amount of $4772 was approved by the Board and an order was issued to that effect. This order is now before the Court for enforcement.

"The substance of the claim of counsel for the respondent on the question of jurisdiction is that, because this Court in its opinion did not specifically remand the case to the Board for the purpose of determining the amount of back wages due Nelson, the case was closed and jurisdiction was lost. Counsel claims that the employee's only relief is to bring a plenary suit against the respondent in a state court.

"There is no merit to the claims of counsel for the respondent. In *National Labor Relations Board* v. *Deena Artware, Inc.*, 198 F.2d 645, this Court granted an order of enforcement similar to one in the case now before us. The Board's Supplemental Decision and Order for the payment of back wages was enforced in that case by this Court in *National Labor Relations Board* v. *Deena Artware, Incorporated*, reported at 228 F.2d 871. See also *N.L.R.B.* v. *Royal Palm Ice Co.*, 201 F.2d 667, 668, C.A. 5; *N.L.R.B.* v. *Bird Machine Co.*, 174 F.2d 404, 405-406, C.A. 1; and *Home Beneficial Life Insurance Co.* v. *N.L.R.B.*, 172 F.2d 62, 63, C.A. 4."

Petitioner refers the Court to the Sixth Circuit's own previous decisions in *N.L.R.B.* v. *Hudson Motor Car Company* (June 22, 1943) 136 F.2d 335 and *N.L.R.B.* v. *Deena Artware*, 207 F.2d 798.

This Court (Petitioner believes) should also examine and consider its recent decision in *Retail Clerk International*

Association v. *Schermerhorn ea al.*, (Dec. 2, 1963) N. 13, October Term, 1963.

Petitioner's position is simply this: The jurisdiction of this Court to enforce a decision of N.L.R.B. is *purely statutory*, although Respondent fully recognizes the right of this Court upon the consideration of the Board's decisions, to remand the case back to the Board for further proceedings and Petitioner's position is that in the absence of such a remand the statutory jurisdiction of this Court to review and enforce a decision of the N.L.R.B. is exhausted by the exercise thereof, and the Board is without statutory authority to ask this Court to review and enforce a supplemental decision and order, particularly where the Respondent has fully complied with the Board's previous enforcement order except for a bona fide dispute as to the amount, if anything, due the employee in question.

It is believed that under these circumstances only individual rights of the parties in question are involved and that any relief presently available would be in a plenary suit brought by the employee in question against Petitioner (which has not been done) to enforce a right of recovery.

It is believed that the controlling principle, which supports petitioner's position, will be found in the above cited case of *N.L.R.B.* v. *Deena Artware*, 207 F.2d p. 801, from which we quote:

> "The Jurisdiction of this Court in the present proceeding is that conferred by Section 160 (e), Title 29 U.S.C.A. under which the Court is empowered to enter 'a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board,' together with the granting of such temporary relief or restraining order as it deems just and proper. That jurisdiction has been exercised by its order enforcing the decree, entered July 30, 1952, followed by the issuance of its mandate on October 7, 1952.

The *supplemental relief* now sought by the petitioner was applied for on April 9, 1953, based largely upon the assignments executed by the respondent on December 16, 1952, several months after this Court had entered its final order and disposed of the case. We are of the opinion that the issue presented by the present application is not one of which this court should take jurisdiction at the present time."

PRAYER

Your Petitioner therefore prays that the Supreme Court of the United States forthwith issue an order granting Petitioner the Writ of Certiorari directed to the Clerk of the United States Court of Appeals at Cincinnati, Ohio, for the purpose of reviewing and determining the legal federal questions involved herein and to enter such other and additional orders as may be required for a full review and oral argument after briefs have been filed with such notice or notices to the respondent as may be required, all to the end that this Court may determine the legal questions hereinabove set forth in the Petition.

This the ..... day of April, 1965.

OMAN CONSTRUCTION CO., INC.
Petitioner

By .....
Cecil Sims
Attorney

No. 15104

United States Court of Appeals

FOR THE SIXTH CIRCUIT

National Labor Relations Board, Petitioner, vs. Oman Construction Co., Inc., Respondent.	On Motion of National Labor Relations Board for Entry of Supplemental Decree Specifying the Amount of Back Pay Due Under Court's Decree of April 22nd.

Decided November 16, 1964.

Before: Cecil and O'Sullivan, Circuit Judges, and Boyd, District Judge.

Per Curiam. This cause is before the Court on motion of the petitioner, National Labor Relations Board, for entry of a supplemental decree specifying the amount of back pay due one William Nelson, under order of this Court of April 22, 1963, enforcing the order of petitioner against the respondent, Oman Construction Co., Inc.

The response to the motion of the Board was a motion to dismiss the action for the reasons: 1. that this Court has no jurisdiction to issue a supplemental decree, and, 2. that if the Court has jurisdiction to issue a supplemental decree, the order of the Board should not be enforced because it is not supported by substantial evidence.

By opinion of this Court, under date of April 22, 1963, reported at 316 F.2d 230, enforcement of the order of the National Labor Relations Board was granted. The opinion

"directed that the involved employee be offered re-employment and made whole for lost wages, as a consequence of his layoff and respondent's refusal to reemploy him." The involved employee was Nelson. A mandate was issued to the Board on the opinion and order of this Court on May 14, 1963. Subsequently, a hearing was had before an examiner. The finding of the examiner that Nelson was entitled to an award of back wages in the amount of $4772 was approved by the Board and an order was issued to that effect. This order is now before the Court for enforcement.

The substance of the claim of counsel for the respondent on the question of jurisdiction is that, because this Court in its opinion did not specifically remand the case to the Board for the purpose of determining the amount of back wages due Nelson, the case was closed and jurisdiction was lost. Counsel claims that the employee's only relief is to bring a plenary suit against the respondent in a state court.

There is no merit to the claims of counsel for the respondent. In *National Labor Relations Board* v. *Deena Artware, Inc.*, 198 F.2d 645, this Court granted an order of enforcement similar to one in the case now before us. The Board's Supplemental Decision and Order for the payment of back wages was enforced in that case by this Court in *National Labor Relations Board* v. *Deena Artware, Incorporated*, reported at 228 F.2d 871. See also *N.L.R.B.* v. *Royal Palm Ice Co.*, 201 F.2d 667, 668, C.A. 5; *N.L.R.B.* v. *Bird Machine Co.*, 174 F.2d 404, 405-406, C.A. 1; and *Home Beneficial Life Insurance Co.* v. *N.L.R.B.*, 172 F.2d 62, 63, C.A. 4.

National Labor Relations Board v. *Deena Artware, Inc.*, 207 F.2d 798, cited by counsel for respondent is not in point.

This was an action by the Board for a temporary restraining order enjoining Deena Artware from giving effect to an assignment of a portion of a judgment in favor of Deena Artware to Deena Products Company. Other citations[1] of counsel are equally inapplicable.

Counsel did not seriously argue the question of the amount of the award of back wages. In answer to a question from the Bench, he stated that he rested his case on the jurisdictional question. We find that the award of back wages made by the Board is supported by substantial evidence and that its order should be enforced.

Enforcement of the Board's supplemental order for an allowance of back wages in the amount of $4772 is allowed.

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1. *Retail Clerk International Association* v. *Schermerhorn et al.*, 375 U.S. 96 (1964); and *N.L.R.B.* v. *Hudson Motor Car Company*, 136 F.2d 385, C.A. 6.

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1964.

OMAN CONSTRUCTION COMPANY, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including April 15th, 1965.

/s/ Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 9th day of February, 1965.

29 U.S.C., Section 160(e) and (f)

PETITION TO COURT FOR ENFORCEMENT OF ORDER; PROCEEDINGS; REVIEW OF JUDGMENT

(e) The Board shall have power to petition any United States Court of Appeals (including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any United States district court, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person re-

sides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or set-

ting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 346 and 347 of Title 28.

REVIEW OF FINAL ORDER OF BOARD ON PETITION TO COURT

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1049

OMAN CONSTRUCTION CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

In 1963, the court of appeals, pursuant to the Board's petition under Section 10(e) of the National Labor Relations Act, sustained the Board's finding that petitioner, Oman Construction Co., had discriminated against employee William Nelson in violation of the National Labor Relations Act and enforced its order requiring that Nelson be reinstated with back pay. *National Labor Relations Board* v. *Oman Construction Co., Inc.*, 316 F. 2d 230, enforcing 137 NLRB 111. In accordance with the Board's practice, however, the Board's original order, while determining Nelson's right to back pay, did not fix the specific

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amount due. Since the parties were unable to reach agreement on this issue after the court of appeals decision, the Board conducted a supplemental hearing to determine the amount of back pay due.[1] On November 13, 1963, the Board issued its Supplemental Decision and Order awarding Nelson $4,772. 144 NLRB 1534. Petitioner refused to comply with this award, whereupon the Board moved the court of appeals for entry of a supplemental decree requiring petitioner to pay the sum determined by the Board in its Supplemental Decision and Order. The court of appeals granted enforcement of this order (Pet. A1–A3).

Petitioner's sole contention (Pet. 4, 8) is that the court of appeals lost the power to enter a decree enforcing the Board's specific back pay award because, in enforcing the Board's original order, the court failed to remand the case to the Board for the computation of the specific amount of back pay due. This contention is insubstantial. The court necessarily retained jurisdiction to enforce any supplementary Board order that was necessary to effectuate the original Board order which it had enforced; in addition, the specific back pay award was itself an order which the court had jurisdiction to enforce under Section 10(e) of the Act. Thus the courts of appeals have uniformly held that, upon enforcement of a Board back pay order entered in general terms, the Board may, "without further direction" from the court, conduct

[1] The procedure for such supplemental proceedings is set forth in the Board's Rules. See 29 C.F.R. § 102.52, *ff*.

proceedings to determine the amount of back pay due under the general order previously enforced by the court, and may then seek a supplemental decree from the court requiring the payment of that amount. *Home Beneficial Life Insurance Co.* v. *National Labor Relations Board*, 172 F. 2d 62 (C.A. 4); *National Labor Relations Board* v. *Bird Machine Co.*, 174 F. 2d 404, 405–406 (C.A. 1); *National Labor Relations Board* v. *Royal Palm Ice Co.*, 201 F. 2d 667, 668 (C.A. 5); see *National Labor Relations Board* v. *N.Y. Merchandise Co.*, 134 F. 2d 949, 951 (C.A. 2). See, also, *National Labor Relations Board* v. *Deena Artware, Inc.*, 361 U.S. 398, 411 (concurring opinion).[2]

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[2] As noted by the court of appeals (Pet. A2–A3), the cases relied upon by petitioner (Pet. 7–9) are inapposite. *National Labor Relations Board* v. *Deena Artware, Inc.*, 207 F. 2d 798 (C.A. 6), dealt only with the question of whether the court would issue an order restraining the employer from assigning assets to creditors before back pay had been computed. Indeed, the court in that case, although denying the restraining order, did subsequently enforce a supplemental back pay order similar to the order here (*National Labor Relations Board* v. *Deena Artware, Inc.*, 228 F. 2d 871). *Retail Clerks International Association* v. *Schermerhorn*, 375 U.S. 96, dealt with the wholly unrelated issue of the power of state courts to enforce state "right-to-work" laws, and *National Labor Relations Board* v. *Hudson Motor Car Co.*, 136 F. 2d 385 (C.A. 6), involved the construction of an ambiguous back pay order.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1965.

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